

No. 75-1730

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In the Supreme Court of the United States

OCTOBER TERM, 1976

TWO TRACTS OF LAND CONTAINING A TOTAL OF 146.4
ACRES, MORE OR LESS, ET AL., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The two opinions of the district court are reported at 387 F. Supp. 319. The opinion of the court of appeals (Pet. App. 15-19) is reported at 532 F. 2d 1083.

JURISDICTION

The judgment of the court of appeals was entered April 6, 1976. The petition for a writ of certiorari was filed on May 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in connection with its Tellico Dam and Reservoir project, the Tennessee Valley Authority may acquire petitioners' property by condemnation.

STATEMENT

The Tennessee Valley Authority (T.V.A.) instituted this condemnation action under the Tennessee Valley Authority Act of 1933, 48 Stat. 58, as amended, 16 U.S.C. 831-831dd, to acquire two tracts of land for T.V.A.'s Tellico Dam and Reservoir project on the Little Tennessee River in east Tennessee. A substantial portion of the larger tract will be inundated; the remainder of the larger tract and the smaller tract, which also borders the reservoir, will be used for shoreline protection and development. The purposes of the Tellico project have been accurately described by the court of appeals in prior unrelated litigation (*Environmental Defense Fund v. Tennessee Valley Authority*, 492 F. 2d 466, 468 (C.A. 6)):

TVA will ultimately acquire thirty-eight thousand acres for development of the project. Sixteen thousand, five hundred acres will be inundated upon completion of the reservoir; the remaining acreage will be developed for industrial, commercial, residential, and recreational purposes. The project plan also contemplates the creation of a new city, Timberlake, with a population of fifty thousand persons.

* * * * *

The Tellico Project is a multi-purpose water resource and regional development project. The reservoir and connecting canal with Fort Loudoun reservoir will serve to develop navigation, flood control, and electric power generation. Other direct benefits claimed by the project are recreational development, fish and wildlife use, water supply, shoreline development, and redevelopment. The project was first authorized by Congress on October 15, 1966.

Petitioners¹ challenged the government's authority to acquire the property at issue here, asserting that the lands were not condemned for use in connection with the Tellico Dam and Reservoir, but were acquired for resale to private industries, a purpose, they contended, not authorized by the T.V.A. Act. In rejecting this contention, the district court held (387 F. Supp. at 321):

The Court has carefully examined the facts and law before it and concludes that * * * it cannot say that TVA is presently acting in an arbitrary and capricious manner simply because the property presently being condemned may ultimately be resold to a private party at some future date.

The Court * * * cannot conclude that the industrial development of the region surrounding the Tellico floodline is so remote from the project's purpose as to be designed for profit making purposes alone. * * * Contrary to defendant's argument and his supporting affidavit Congress' object in its acquisition and resale program was founded upon public purpose:

"The plan to acquire key lands for industrial and recreation development and resell them as demand for such property increases reflects the

¹Although the Federal Land Bank of Louisville, and E. V. Landers, trustee, are listed as petitioners, they were not parties to the appeal below, which was taken solely by "Robert G. Davis and wife, Viva Lee Davis" through their present counsel. The Federal Land Bank was a defendant because it held a lien on one of the condemned tracts under a trust deed naming E. V. Landers trustee (Pet. App. 25). The answer filed in the district court on behalf of those defendants by their attorney, Charles L. Hardin of Louisville, Kentucky, denied neither the government's authority to take the land nor the necessity for the taking.

public purpose of the project in meeting the serious need for measures to speed growth in employment in this part of eastern Tennessee."

While defendant argues that industrial growth is not needed in this region, it is not this Court's position to reappraise the wisdom of congressional policy in this regard. "The role of the judiciary in determining whether that power [of eminent domain] is being exercised for public purpose is an extremely narrow one." *Berman v. Parker*, 348 U.S. 26, 32] * * *. Cf. *United States v. 544 Acres of Land*, 314 F. Supp. 273 (E.D. Tenn. 1969).

The court of appeals affirmed (Pet. App. 15-19), relying upon the portion of the opinion of the district court just quoted (*id.* at 18-19).

ARGUMENT

Petitioners contend (Pet. 12) that the T.V.A. does not have authority to acquire by condemnation the property at issue in this case. In *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U.S. 546, 553-554, this Court recognized the broad responsibilities placed on T.V.A. by the Act. These responsibilities include more than building isolated dams; they include responsibility for the "agricultural and industrial development of the whole Tennessee Valley" (327 U.S. at 553).²

²As the Court stated (327 U.S. at 553):

All of the Authority's actions in these respects were to be directed towards "development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act . . . all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas . . ."

Moreover, the Court also recognized T.V.A.'s authority under the Act to acquire by condemnation any property it deemed necessary to fulfill these responsibilities.³

With respect to the Tellico project, at issue here, the use of the land to be acquired was fully described during the original appropriation hearing. Hearings on Public Works Appropriations for 1967 before a Subcommittee of the House Committee on Appropriations, 89th Cong., 2d Sess., pt. 2, 754-766 (1966) ("1966 Hearings"). See also Hearings on Public Works Appropriations for 1966 before a Subcommittee of the House Committee on Appropriations, 89th Cong., 1st Sess., pt. 3, 14-32, 145-151 (1965); Hearings on H.R. 9220 before a Subcommittee of the Senate Committee on Appropriations, 89th Cong., 1st Sess., pt. 4, 43-61 (1965). During the 1966 Hearings (at 765) T.V.A. stated that the Tellico project would contribute greatly to the industrial development of the area and proposed a plan for land acquisition that would assure the availability of sites needed for that development. T.V.A. expressed the belief that advanced planning was necessary to assure more effective

³The Court referred to the specific statutory authority of T.V.A. to acquire property by condemnation (327 U.S. at 553-554):

To discharge its responsibilities the T.V.A. was granted "such powers as may be necessary or appropriate" for their exercise. Section 4(h) of the Act gives the T.V.A. the very broad power to "exercise the right of eminent domain . . ." Section 4(i) of the Act empowers the Authority to condemn certain specified types of property and concludes by referring to "all property that it [the Authority] deems necessary for carrying out the purposes of this Act . . ." To make clear beyond any doubt the T.V.A.'s broad power, Congress in §25 authorized the Authority to file proceedings, such as the ones before us, "for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act."

use of shoreline lands than in the past, when sites best suited for industry had been used for other purposes. *Ibid.* At the same time T.V.A. sought to assure that there would be adequate provisions for public and private recreation, homesites, and other purposes. *Ibid.*

In short, as was made clear in the 1966 Hearings (*ibid.*):

The plan to acquire key lands for industrial and recreation development and resell them as demand for such property increases reflects the public purpose of the project in meeting the serious need for measures to speed growth in employment and general economic development in this part of eastern Tennessee.

Congress appropriated funds for the Tellico project in fiscal year 1967 and each year thereafter, notwithstanding objections to the project similar to those petitioners make here. See, e.g., Hearings on H.R. 17787 before a Subcommittee of the Senate Committee on Appropriations, 89th Cong., 2d Sess., pt. 4, 62-80 (1966); Hearings on H.R. 18127 before a Subcommittee of the Senate Committee on Appropriations, 91st Cong., 2d Sess., pt. 5, 380-384 (1970). As both courts below held, the acquisition of the property at issue here was contemplated by Congress and is fully within T.V.A.'s authority under the Act. See *United States ex rel. Tennessee Valley Authority v. Welch*, *supra*.

Petitioners nevertheless contend (Pet. 7-12) that under *Brown v. United States*, 263 U.S. 78, T.V.A. may not accomplish its purpose by condemning property ultimately intended for resale to private buyers. But *Brown* does not stand for the proposition for which it is cited. Petitioners' quotation from the *Brown* opinion (see Pet. 9) to the effect that eminent domain "does not extend

to the taking of one man's property to sell it to another"—is taken from the Court's recitation of counsel's argument (263 U.S. at 81), which the Court rejected by upholding the condemnation of property that was to be resold to other private parties. Whatever doubts remained after *Brown* concerning the power of the federal government to condemn land for resale to private parties were resolved in *Berman v. Parker*, 348 U.S. 26, a case petitioners do not cite. There the Court upheld the taking of privately owned commercial property in the District of Columbia in connection with a slum clearance and redevelopment project in which the condemned property was to be used as part of an integrated plan for new homes, schools, churches, parks, streets, and shopping centers. The Court held (348 U.S. at 33):

Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. * * * Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.

Under this analysis, the decisions below are correct. The Tellico project serves clear and valid public purposes well within the scope of T.V.A.'s responsibility under the Act, as Congress has repeatedly recognized in the course of its appropriation of funds. The acquisition of petitioners' land is thus valid; T.V.A. is not prohibited from effectuating its plan in the manner it has chosen.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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